IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

APPEAL NO.94 OF 2005
FROM
NOTICE OF MOTION NO.839 OF 2004
IN
SUIT NO.817 OF 2004

Mrs.Saied Unnisa Begum & ors. — Appellants
vs.
Jameel Ahmed Hussain & ors. — Respondents

Mr.S.A.Divan, senior counsel with Mr.Swapnil Bangur i/b.M/s.Meghraj & Associates for the appellants.

Mr.Navin Parekh with Ms.Hetal Patel i/b.Ms.Hetal Patel for the respondents 1 to 4 and 6.

CORAM : R.M. LODHA &
ANOOP V. MOHTA, JJ.

DATED : 6th February 2006

P.C.

The matter was posted today for consideration of notice of motion. Looking to the controversy involved, we indicated to the learned senior counsel and the counsel appearing for the parties that it would be in the fitness of things if the appeal itself was heard on merits as it would avoid multiplicity of arguments. The learned senior counsel and the counsel accordingly addressed us in the appeal.

2. The present appellants are the plaintiffs. They filed the Suit for the following reliefs:

(a) this Hon’ble Court be pleased to cancel, revoke and/or set aside the Deed of Conveyance dated 27th February, 1998 executed by Defendant No. 5 & 6 as Constituted Attorney of Defendant No.3 & 4 in favour of Defendant No. 1 & 2 in respect of the property being Final Plot bearing No.39, CTS Nos.178 and 178/1 together with a structure standing thereon known as "CHAMAN" situate, lying and being at Dadabhai Navroji Road, Andheri (West), Mumbai 400 057 and more particularly described in Exhibit "C" to the plaint.

(b) this Hon’ble Court be pleased to cancel, revoke and/or set aside the Agreement for Sale dated 27th February, 1998 executed by Defendant No. 5 & 6 as constituted Attorney of Defendant No. 3& 4 in favour of defendant No.1 & 2 in respect of the property being Final plot bearing Plot No.40, CTS Nos.179 and 180 situate, lying and being at Dadabhai Navroji Road, Andheri (West), Mumbai 400 057 and more particularly described in Exhibit "C-1" to the plaint.

(c) this Hon’ble Court be pleased to declare that Defendant Nos. 1 to 4 are not the legal heirs of said Sabiha Latifee.

(d) that this Hon’ble Court be pleased to declare that the plaintiffs are the only heirs of deceased Sabiha Latifee.

(e) this Hon’ble Court be pleased to cancel, revoke and/or set aside various documents, affidavits, applications, petitions signed by Defendant No.7 as the Constituted Attorney of the Basheerullah as also on behalf of the plaintiffs.

(f) that this Hon’ble Court be pleased to rectify the records of the City Survey Officer in respect of property (i) being Final plot bearing No.39, CTS Nos.178 and 178/1 together with a structure standing thereon known as "CHAMAN" situate, lying and being at Dadabhai Navroji Road, Andheri (West), Mumbai 400 057 (hereinafter referred to as "the

first property") and (i) final plot bearing Plot No.40, CTS Nos.179 and 180 situate, lying and being at Dadabhai Navroji Road, Andheri (West), Mumbai 400 057 and more particularly described in Exhibits "C" and "C-1" respectively to the plaint.

(g) that the Defendants, their servants agents and all persons claiming through or under them be restrained by a permanent order and injunction of this Hon'ble Court form in any manner whatsoever transferring, selling, alienating, dealing with, disposing off, creating and/or inducting any third party in respect of plot bearing (i) Final Plot bearing No.39, CTS Nos.178 and 178/1 together with a structure standing thereon known as "CHAMAN" situate, lying and being at Dadabhai Navroji Road, Andheri (West), Mumbai 400 057 and (ii) final plot bearing plot No.40, CTS Nos.179 and 180 situate, lying and being at Dadabhai Navroji Road, Andheri (West), Mumbai 400 057 more particularly described in Exhibit "C" and "C-1" to the plaint.

(h) that pending the hearing and final disposal of the suit the Court Receiver, High Court, Bombay be appointed Receiver of the plot bearing (i) Final Plot bearing No.39, CTS Nos.178 and 178/1 together with a structure standing thereon known as "CHAMAN" situate, lying and being at Dadabhai Navroji Road, Andheri (West), Mumbai 400 057 and (ii) final plot bearing Plot No.40 CTS Nos.179 and 180 situate, lying and being at Dadabhai Navroji Road, Andheri (West), Mumbai 400 057 more particularly described in Exhibit "C" and "C-1" to the plaint with all power under Order XL of the Code of Civil Procedure, 1908.

(i) that pending the hearing and final disposal of the suit, the Defendants, their servants agents and all persons claiming through or under them be restrained by a temporary order and injunction of this Hon'ble Court form in any manner whatsoever transferring,

selling, alienating, dealing with, disposing off, creating and/or inducting any third party in respect of plot bearing (i) Final plot bearing No.39, CTS Nos. 178 and 178/1 together with a structure standing thereon known as "CHAMAN" situate, lying and being at Dadabhai Navroji Road, Andheri (West), Mumbai 400 057 and (ii) final plot bearing Plot No.40, CTS Nos.179 and 180 situate, lying and being at Dadabhai Navroji Road, Andheri (West), Mumbai 400 057 more particularly described in Exhibit "C" and "C-1" to the plaint.

(j) For ad-interim reliefs in terms of prayers clause (h) and (i) above."

3. The plaintiffs took out notice of motion for appointment of Court Receiver and grant of temporary injunction in respect of plot bearing (i) Final Plot No.39, CTS Nos.178 and 178/1, together with structures known as "Chaman" situate at Dadabhai Navroji Road, Andheri (West), Mumbai and (ii) final plot bearing No.40, CTS Nos.179 and 180 situate at Dadabhai Navroji Road, Andheri (West), Mumbai. The learned motion Judge dismissed the notice of motion by the order dated 7th December 2004 holding that the Suit itself was not maintainable by virtue of provisions of Order XXII Rule 9 of Code of Civil Procedure and, therefore, the plaintiffs cannot be said to have made out any case for grant of interim relief.

4. The learned motion Judge held that the Suit was not maintainable by virtue of Order XXII Rule 9 of Code of

Civil Procedure as in the opinion of the learned Single Judge, Mohd.Basheerullah through whom the plaintiffs claimed their right, title and interest in the subject property filed a testamentary petition which later on, upon caveat being filed interalia by the respondent no.1, was converted into the Testamentary Suit and the said Suit came to be dismissed as abated on the death of Mohd. Basheerullah.

5. Mr.Shyam Divan, the learned Senior Counsel for the appellants urged that the learned motion Judge manifestly erred in applying Order XXII Rule 9 of the Code of Civil Procedure when the cause of action in the present Suit is entirely different from the Testamentary Suit.

6. We wanted to know from Mr.Shyam Divan, the learned Senior Counsel for the appellants, the material produced by the appellants justifying grant of interim relief even if it was assumed that Order XXII Rule 9 was not attracted. We thought it was not in the interest of justice to send the matter back to the motion Judge for its consideration on merits as we found that earlier also the matter was remitted to the learned motion Judge for consideration of notice of motion on merits by the order passed in appeal on 17th June 2003.

7. Relying upon the genealogy (page 34) and the documents viz. (i)marriage certificate of Sabiha Futehally and Kamran Latifee (page 37), (ii)certificate of birth of Mehboob Begum from Sabiha Latifee and Kamran Latifee (page 39), (iii)marriage certificate of Mehboob Begum and Mohammed Baquer Hussain (page 40), (iv)certificate of birth of Mohammed Basheerullah out of wedlock of Mehboob Begum and Mohd.Baquer Hussain (page 41), (v)certificate of death of Mehboob Begum (page 46), (vi)certificate of death of Mohammed Baquer Hussain (page 48) and (vii)certificate of death of Mohammed Basheerullah (page 33), the learned senior counsel for the appellants contended that the subject property initially was owned by Sabiha Latifee that was inherited by her daughter Mehboob Begum and after her death it came to Basheerullah and then inherited by the appellants.

8. On the other hand, Mr.Navin Parekh, the learned counsel for the respondent nos.1 to 4 and 6 submitted that the genealogy disclosed by the appellants at page 34 is factually incorrect. According to him, the correct genealogy is shown at page 197. He would submit that Basheerullah was not the son of Mehboob Begum and Mohammed Baquer Hussain. He invited our attention to the previous judgments in various

proceedings between Mohammed Basheerullah and Jameel Ahmed Hussain - the respondent no.1 wherein it has been held by the Courts that Mohammed Basheerullah was not the son of Mohammed Baquer Hussain and Mehboob Begum.

9. We considered the rival submissions. The material, prima facie, indicates that Mohammed Basheerullah was not the son of Mehboob Begum and Mohammed Baquer Hussain. As a matter of fact, Mohammed Basheerullah miserably failed during his life time in establishing his right in the estate left by Mehboob Begum and Mohammed Begum Hussain or any right in the subject property.

10. Surely if Mohammed Basheerullah had no right or interest in the subject property, the appellants who claim to be legal heirs of Mohammed Basheerullah cannot claim any right, title or interest in the suit property.

11. It is pertinent to note here that according to respondent nos. 1 and 2, Mehboob Begum was not the daughter of Sabiha Latifee. From the two genealogy tables, one produced by the plaintiffs (page 34) and the other produced by the respondents 1 and 2 (page 197), one thing that emerges is that Atiya Nazar Mohammed Futehally was the original person through whom

the appellants as well as the respondents 1 and 2 are claiming their right and interest in the subject property. According to the appellants, Atiya Nazar Mohammed Futehally was survived by one daughter Sabiha Latifee, while as per the case set out by the respondents 1 and 2, Atiya Nazar Mohammed Futehally was survived by four daughters viz. (i)Ameena Mqubil Futehally, (ii)Rafia Baquer Hussain, (iii)Sakina Faiz Abdulali and (iv)Sabiha Kamran Latifee. Mohammed Basheerullah in his lifetime in one of the proceedings admitted that Atiya Nazar Mohammed Futehally was survived by four daughters. According to the appellants Sabiha Latifee was survived by one daughter Mehboob Begum. On the other hand, the case of the respondents 1 and 2 is that Sabiha Kamran Latifee was survived by one daughter-Azra Daleep Hussain and one son-Anjum Alma Latifee. The respondent no.1 claims to be son of Rafia Baquer Hussain (one of the daughters of Atia Nazar Mohammed Futehally) and Prof.Mohammed Baquer Hussain. It is not necessary to go into the rival contentions in respect of the genealogy submitted by the parties as that would be considered in the Suit based on the evidence on record, but one thing is very clear that as per the plaintiffs' own case Sabiha Latifee had one daughter Mehboob Begum who married with Mohammed Baquer Hussain and out of the wedlock of Mehboob Begum and Mohammed Baquer Hussain, Mohammed

Basheerullah was born. Mohammed Basheerullah filed a Suit for partition claiming 40 paisa share in the property left by Prof.Mohammed Baquer Hussain and for separate possession. Interalia the subject property was part of that Suit. In that Suit the present respondents 1 and 2 were defendants. The IInd Senior Civil Judge, City Civil Court, Hyderabad dismissed Mohammed Basheerulla's Suit vide judgement dated 7th December 2000 holding that Mohammed Basheerulla was not the son of late Baquer Hussain born through his wife deceased Mehboob Begum. That the said judgement and decree has attained finality is not in dispute. Mr.Shyam Divan, the learned senior counsel sought to contend that the only finding that has been given in that Suit is that Mohammed Basheerulla was not the son of Baquer Hussain born through his first wife deceased Mehboob Begum, but in that Suit the finding has not been given that Mohammed Basheerulla was not the son of Mehboob Begum. It is plaintiffs' own case that Mohammed Basheerullah was born out of the wedlock of Mehboob Begum and Baquer Hussain. Once the finding has been given by the Court that Mohammed Basheerullah was not the son of Baquer Hussain born through his first wife Mehboob Begum, it is clear that Mohammed Basheerullah has not been held to be son of Mehboob Begum. Even the present respondent no.1-Jameel Hussain filed a Suit for declaration that Mohammed Basheerullah

was not the son, legitimate or illegitimate of late Prof.Mohd.Baquer Hussain. That Suit was decreed on 26th August 1994 declaring that Mohammed Basheerullah is an utter stranger and not the son, legitimate or illegitimate of Prof.Mohd. Baquer Hussain. It appears that Mohammed Basheerullah made an application for setting aside the decree dated 26th August 1994 but the said application came to be dismissed on 13th March 1995. Mohammed Basheerullah also filed a Suit concerning the subject property alleging that it formed part of the estate left by late Baquer Hussain and that he, Jameel Hussain and Arjumand were the three children having 1/3rd share each in that property. The notice of motion is said to have been taken out in that Suit which was dismissed on 22nd March 1995 recording prima facie finding that Mohammed Basheerullah was an impostor. A chamber summons is also taken out by Mohammed Basheerullah in that Suit for amendment in the plaint alleging that due to mistake, the property at Andheri was described as belonging to Mohammed Baquer Hussain whereas factually it was of his maternal grand mother. The said chamber summons came to be dismissed on 24th April 2000 and ultimately the Suit came to be dismissed on 20th June 2000. We are informed that notice of motion and chamber summons have been taken out for restoration of the Suit and are pending. Be that as it may, it is more than clear that during his

lifetime Mohammed Basheerullah initiated number of proceedings and miserably failed to establish that he was born out of wedlock of Mehboob Begum and Mohammed Baquer Hussain. Prima facie, therefore, Mohammed Basheerullah cannot be said to have had any right, title or interest in the subject property. In that view of the matter, the plaintiffs who claim to be legal heirs of Mohammed Basheerullah cannot be said to have any right, title or interest in the subject property. The plaintiffs have miserably failed to establish prima facie case justifying appointment of Court Receiver or grant of temporary injunction in respect of the subject property.

12. The appeal has no merit and is dismissed with no order as to costs.

(R. M. LODHA, J.)

(ANOOP V. MOHTA, J.)